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Book Review

Carl E. B. McKenry Jr.

BOOK REVIEWS

THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER, by Lawrence A. Frost. Norman, Oklahoma 73069; University of Oklahoma Press, 1968, pp. xviii, 280. $5.95.

> In this that Brevet[1] Major General George A. Custer, Lieutenant Colonel, 7th U.S. Cavalry, while commanding and marching a column of his regiment, six companies or thereabouts strong, did, on or about the seventh day of July 1867, at a point about fifteen miles south of Platte River, and about fifty miles south west from Fort Sedgewick, Colorado, order and cause the summary shooting, as a supposed deserter, but without trial, of one Private Charles Johnson, Company K, 7th U.S. Infantry, a soldier of his command; whereby he, the said Johnson was so severely wounded that he soon after—to wit, on or about the 17th day of July, 1867, at or near Fort Wallace, Kansas—did decease; he the said Custer thus causing the death of him the said Johnson.[2]

The foregoing is the most serious and the most graphic of the many charges which precipitated General Custer's court-martial in 1867.

The events which resulted in his trial and temporary fall from grace occurred some nine years before the tragic massacre at Little Big Horn. They are recounted here with dramatic skill and scholarly patience. This is a book of history, not of law. As history, it is delightful reading. The author knows his characters and has considerable expertise in the military history of the mid-nineteenth century. He also has a flair for reporting and his descriptions of the routine of a cavalry regiment on the march are vivid and straightforward. His account of the trial and its surrounding events is objective and well documented. As may be expected, the author has a certain sympathy for his protagonist. Nevertheless, he has his ear well tuned to the intrigues of the times and is sensible, both of the betrayals and exploitation of the Indian by the land-

1. Brevet rank was awarded for meritorious service or heroism. It carried no command authority nor did the holder receive pay based on brevet rank. Brevet ranks were intended to be temporary but they were never recalled and officers holding brevet rank continued to be addressed as such. *See* p. 98, n. 1.
2. Specification Fourth of the Additional Charge, p. 102.

hungry whites and the savage depredations of the displaced red men.

It is perhaps unfair to evaluate the book from a legal point of view. Its purport as a legal source book is simply to set out verbatim, the record of General Custer's court-martial, with, however, the omission of "repetitious legal formality."[3]

Nevertheless, the lawyer reader would have preferred to have had the entire record reproduced, together with extracts of pertinent statutory and regulatory material bearing upon the charges and the procedure then obtaining in trials-by courts-martial. Had such material been included, the value of the book as a legal reference would have been considerably enhanced. As it is, it is extremely useful. It whets the appetite of the reader interested in military legal history and provides an insight into the system of military justice prevailing in the early years following the Civil War.

General Custer was brought to trial for derelictions he allegedly committed while commanding a contingent[4] of the Seventh Cavalry on a march to scout an area in Western Kansas, Nebraska and Colorado.[5] The march experienced ill-luck from the start. The troops had hardly been on the trail a week when one of Custer's senior staff officers committed suicide while drunk. Bad food,[6] conflicting instructions,[7] widespread desertions and a route of march marked by savage Indian massacres, cholera epidemics and daily evidence of broken treaties, political intrigue and bureaucratic bungling, foredoomed Custer's expedition.

The whole fiasco began when General Hancock incensed friendly Indians by burning a village he thought abandoned.[8] This united the tribes and changed a condition of sporadic raids to all out war. Someone had to be blamed for the failure of the campaign to pacify the Indians. It was Custer's misfortune to have liberally interpreted his orders to suit his own convenience and to have displayed poor judgment in handling his troop. His misdeeds took the pressure off his superiors and he became the scapegoat.

The author devotes 95 pages to outlining this thesis.[9] The remainder of the book deals with the court-martial and its aftermath. The interrogation of the witnesses is reproduced verbatim and

3. *See* Preface at p. x. There is no analysis of the legal issues. Of the early authorities, such as O'Brien, Maltby, Benet and Winthrop, only Benet is cited. *See* p. 123.

4. Between 300 and 350 men. *See* p. 37.

5. His mission was to investigate Indian depredations and clear the area of unfriendly Indians.

6. Some hardtack supplied the troops had originally been packaged for issue during the Civil War. (p. 79).

7. Towards the end of the march, Custer was ordered to proceed to Fort Wallace and there meet General Hancock who would give him further orders. When Custer reached Fort Wallace, General Hancock had already left, but without leaving Custer any new orders.

8. P. 24.

9. Chapters 1 to 9 inclusive.

the rulings of the court and comments of the parties are described in detail.

The charges and specifications against Custer, to all of which he pleaded not guilty, fell into two groups. Charge I of the original charges, alleged absence without leave, in that Custer left his command at Fort Wallace without proper authority and went to Fort Harker from which point he was able to obtain permission from his next superior there present to visit his family at Fort Riley. His defense that he wanted to expedite securing supplies pending receipt of further orders from General Hancock was somewhat specious, considering that the route he took made it easier for him to visit his family and that he left his command in a precarious position. However, he was acquitted of this charge.

The second charge (Charge II of the original charges) alleged three specifications of conduct to the prejudice of good order and military discipline. Specification One of this charge alleged Custer had executed a rapid march on private business without authority and in so doing damaged horses belonging to the Government. Custer was acquitted of this specification but found guilty of the second specification[10] of this charge which alleged that Custer had wrongfully appropriated some Government ambulances and mules when he made the journey from Fort Wallace to Fort Harker on purported "private business." However, in its findings, the Court attached no criminality to Custer's conduct respecting the use of the ambulances and mules. Custer was found not guilty of the third specification of this charge, which alleged he had been derelict in failing to take proper measures to rescue some of his men who had been attacked by Indians. The net result of these findings was that Custer was found guilty of the charge and guilty (but without criminality), of one specification and not guilty of the remaining specification of the charge.

Had that been all that had been alleged against Custer, the sentence would probably have been a reprimand. But Custer, a teetotaler, had accused one of his officers, a Major West, of being drunk on duty and West wanted revenge. He filed additional charges against Custer under the general article[11] alleging four

10. There appears to be some ambiguity in the findings or in the author's report of them. The findings described at page 245 respecting Specification 1, Charge 1, mention ambulances and numbers of mules, but this language obviously relates to Specification 2, Charge 11; *see* pp. 99, 100.

11. At the time, Article 99 of the Articles of War of 1806, which provided:

> All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

This article, which is derived from Sec. XX, Art. III of the British Articles of War of 1765, has its modern counterpart in Art. 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (1964).

instances of conduct to the prejudice of good order and military discipline. The incident that gave rise to these charges occurred on July 7, 1867. Custer was faced with a rash of desertions and when the cry was raised that a group of men with weapons (and some with horses) were leaving the camp in broad daylight without authority, Custer acted quickly to send a detail to capture them. Three of the alleged deserters were shot, one of whom subsequently died. Of the others, some surrendered and the rest made their escape, for what it was worth, into hostile Indian country.

The testimony is conflicting as to what followed from Custer's careless use of phrases such as "shoot to kill" and "bring none of them back alive,"[12] but he was found guilty of ordering three soldiers pursued as suspected deserters to be shot down without trial (Specification two)[13] and to have wrongfully caused the death of Private Johnson as alleged in Specification four, quoted at the beginning of this review. His alleged callousness in refusing to allow the wounded deserters to obtain medical care was not established (Specification three).

The sentence, which reviewing authorities refused to mitigate because they believed the court had granted clemency to Custer, was "to be suspended from rank and command for one year and forfeit his pay for the same time."[14]

Some observations from a legal point of view merit mention. The court-martial that tried Custer had no presiding legal officer, nor was either the Government nor the defense represented by qualified counsel, yet it is safe to say that the parties involved were thoroughly familiar with military law and there is no suggestion of lack of competence or preparation by either side.

The rights of the defense when compared to a present day court-martial were certainly minimal. Under the then prevailing procedure, the accused could be represented by his military friend and legal counsel but he had no right as he does at present to the services of a qualified lawyer at Government expense. Unless, as was done in this case, the court waived the requirement, he had to submit questions in writing to be asked of witnesses and could not interrupt the testimony by prompt objections. The testimony was transcribed in long hand or a form of short hand by a phonographic reporter, who read back the testimony of the witness before he left the stand whereupon the witness was asked if he agreed with the transcription.

12. *See* pp. 150-155, 159-163, 178-179 and the report of the subsequent civil trial at pp. 262-263. Under the circumstances, it would be easy for the pursuers to plead self defense had they been charged, however literally they might choose to follow the illegal shoot to kill order.

13. The findings included exceptions and substitutions not here pertinent.

14. P. 246.

The testimony, were it to be offered in a present day court-martial, would face some minor exclusionary challenges. Leading questions abound, as do questions calling improperly for the opinion of witnesses. The record discloses some hearsay but it is basically harmless. The defense claimed prejudice by the court's denial of a defense objection on the ground that a witness who had previously testified on direct and cross-examination could not again be called by the prosecution to give evidence on a new matter. Lieutenant Cook was recalled to give damaging evidence concerning the Specification Four of the Additional Charge after he had previously testified respecting Charge II of the original charges. The objection here seems a bit specious because the conduct of the trial was made more orderly by calling evidence on the additional charges after all of the witnesses with respect to the original charges had been heard. There is, however, some justification for the thesis that the prosecution waives re-direct unless he obtains the court's permission to recall witnesses later in the case.

With respect to the aftermath of the trial, the author relates that Custer spent his period of suspension relaxing at Fort Leavenworth where for a time he was the guest of General Sheridan. Later Custer returned to his home state of Michigan where he spent his time writing and fishing.

But his troubles were not over. He carried on a battle in the press over the events of the campaign and was brought to trial before the civil courts in Kansas on a charge of murdering Private Johnson. His co-defendant was Lieutenant Cook, who had fired the fatal shot. These charges against Custer were promptly dismissed,[15] but his battle with the press was to continue.

Slightly less than a year later, Custer was returned to favor. His pay and rank restored, he was ordered back to Fort Hays fortified by more vague orders of the kind that would give scope to his dashing character and perpetuate the Custer legend.[16]

In sum, this is not a source book for the advocate, but it has value to the legal historian and more especially to the reader interested in the role of the Army in the settlement of the Plains. It is a good book and well worth reading.

HAROLD D. CUNNINGHAM, JR.*

15. P. 263, The reader is not informed of what happened to Lieutenant Cook.
16. "On October 4, he wrote to Libbie (Mrs. Custer) from Fort Hays:
I breakfasted with Genl. Sheridan and staff, he said, 'Custer, I rely on you in everything, and shall send you on this expedition without orders, leaving you to act entirely on your own judgement'." (P. 267).

* B.A., Manhattan College; LL.B. Boston College Law School; LL.M. New York University School of Law; B.C.L. Oxford University, England; Dean, University of North Dakota School of Law.

THE LAW OF AIRSPACE, by Robert R. Wright. Bobbs-Merrill Co., Inc. 4300 W. 62nd St., Indianapolis, Indiana 46268, 575 pages. $17.50. 1968.

The author suggests that this book is primarily on "the legal aspects of airspace utilization from the standpoint of property rights and on various types of airspace transactions and the considerations in connection with them."[1]

In *The Law of Airspace,* Professor Wright has actually produced two books in one, for the law of airspace as it applies to aeronautics is quite different from the law of airspace as used in the context of air rights over railroad tracks or existing streets, or ownership rights in high-rise condominiums. The justification for this somewhat forced marriage lies in the common heritage each shares in the concepts of airspace ownership existing prior to the aircraft.

Cujus est solum, ejus est usque ad coelum.

Like most treatises or tomes on the subject of airspace rights this ancient doctrine is given extensive consideration by the author. Through two chapters, one devoted to its English background, and the other to its application in America, he traces its origin and development. Appropriately so! For it constitutes both a point of beginning and a partial point of departure for any scholarly treatment of the subject.

It is a point of beginning because of its historical origins alteratively attributed to a statement of the Roman glossator Accursius of Bologna:

Cujus est solum ejus debet esse usque ad coelum.

to Jews carrying it with them from the Continent to England with the Norman conquest; and finally to the English appearing in (Lord) Coke on Littleton (1628).[2]

The first reference to the maxim in England is considered to be contained in a note to *Bury v. Pope,*[3] a sixteenth century case involving an action for blocking out the light to the building of an adjacent property owner. As Professor Wright points out, probably the best known expression of the concept is found in Blackstone:

> Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum* (whoever has the land possesses all the space upwards to an indefinite extent), it is the maxim of

1. WRIGHT, THE LAW OF AIRSPACE 5 (1968).
2. *Id.* at 15.
3. Cro. Eliz. 118, 78 Eng. Rep. 375 (ex. 1587).

> the law; upwards, therefore, no man may erect any building, or the like to overhang another's land: and downwards, whatever is in direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface . . . So that the word "land" includes not only the face of the earth, but every thing under it, or over it.[4]

It is a partial point of departure in the sense that it has no practical applicability in solving the legal problems of aeronautics and astronautics if allowed its absolute meaning and given consistent enforcement.

Beyond the historical "*ad coelum*" chapters, a single extensive chapter entitled: "Aviation and Airspace Ownership," considers the entire spectrum of aeronautical questions related to property rights in the surface.

The case of *United States v. Causby*[5] is treated as pivotal. The presently accepted role of real property ownership in litigation stemming from disturbances by aircraft of the use and enjoyment of the surface dates from the *Causby* case, not from the so-called "ad coelum" doctrine, although the majority opinion of Justice Douglas does make specific reference to it.

Holding the doctrine "has no place in the modern world,"[6] the court recognized the statutory[7] public right of transit in the navigable airspace, but went on to state that as an incident to dominion over the surface the landowner owns "at least" as much superadjacent space as he can occupy or use in connection with his enjoyment of the surface. The standard of a "taking," therefore, was whether flights over private land "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land," and the measure of damages the demonstrable diminishing in the monetary value of the surface as a result thereof.

Many authorities consider the *Causby* rationale to be a pragmatic product of the procedural and jurisdictional problems with which the Supreme Court was confronted in reaching the obviously desired relief for the Causbys[8] and now partially outdated by more recent federal statutes.[9] The decision did establish recovery nonetheless on the basis of ownership and, as a result, Professor Wright

4. Wright, *supra* note 1, at 13, quoting 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Ch. 2, at 19 (p. 445 in I Cooley 4th ed. 1899).
5. 328 U.S. 256 (1946).
6. *Id.* at 260-261.
7. Section 6 of the Air Commerce Act of 1926 and Section 3 of the Civil Aeronautics Act of 1938.
8. The suit was instituted in the Court of Claims, under the Tucker Act, against the United States, asserting a "taking" by the United States of their property for which they were entitled to compensation in accordance with the Fifth Amndment. The Federal Tort Claims Act (1946) permitting a tort action against the United States had not yet come into being.
9. BILLYOU, AIR LAW, 49-50 (2d ed. 1964).

believes that it did not completely abolish the "*ad coelum*" doctrine, but rather made the doctrine "responsive to the economic and social demands of the air age while recognition was simultaneously accorded to its inherent limitations."[10]

The rather obvious fact that such objectionable elements as noise, dust, dirt, landing light glare, noxious smoke and extreme vibrations can be equally unsettling and equally destructive of property values even when conducted over adjacent property was not considered in *Causby*. The author goes on to consider the line of cases since *Causby* whether based upon nuisance, trespass or eminent domain where direct overflights have not been pre-requisites of recovery. While he states that recovery without direct overflight of the land in question is still in the minority, concern is expressed that wide spread acceptance of recovery without physical overflight "might well extend over into the highway area of litigation" with the potential underlying economic ramifications.[11]

In conclusion Professor Wright suggests that *Causby* and subsequent cases indicate that recovery ultimately must rest largely upon the facts of the individual cases and the severity of the economic loss.

While the aviation aspects are by no means pioneering, (*e.g.* Charles S. Rhyne in 1944 wrote extensively on the subject in his *Airports and the Courts*) they do represent a comprehensive collection of case authority and statement of theoretical positions of case authority and statement of theoretical positions of recovery for aircraft disturbances to the use and enjoyment of the surface to the present time.

However, it is in the other areas of airspace rights that this book makes its greatest contribution. Professor Wright considers the modern condominium, the most recent development of the upper chamber concept, as the device of city-dwellers stemming from an urban society, land scarcity, and the desire for individual ownership of real estate. He traces its origin and growth to the current impact which it now has on existing real property law, citing differentiating factors between ownership of a condominium and ownership of unenclosed space, and concluding that there is a close interrelationship between condominium airspace units, the common law "upper chamber" and the sale or lease of airspace over highway and railroad rights of way from a property standpoint.[12]

In another chapter, considering the problems of ownership of

10. Wright, *supra* note 1, at 208-209.
11. *Id.* at 180-181.
12. *Id.* at 98-99.

airspace in America, the author observes that commercial, and public use, and development of airspace concepts and applications are only beginning, and will become more critical as urban problems intensify.[13]

Tracing American airspace case law in highway and bridge, railroad, and finally, condominium cases, Professor Wright shows that the courts have been cognizant generally of the modern need for the creation of separate interests in airspace unconnected with ownership of the surface.

However, he suggests the somewhat surprising and incongruous situation:

> (1) Case law relating to sales or leases of airspace or rights in airspace is rather sparse, and;
>
> (2) The practice of purchasing or leasing airspace or otherwise acquiring rights in airspace is quite common in large urban areas today.[14]

Noting recent state and federal enactments permitting the creation of ownership and subdivision of airspace, the author cites the fact that the condominium has had such an impact that every state, save Vermont, has enacted legislation to aid in the regulation and conduct of this form of property ownership. Similar treatment has been afforded or is being considered in regard to airspace rights over highways and railroads.

To demonstrate the increasing utilization of airspace rights, a substantial section of the book consists of numerous illustrations of commercial applications of airspace. The prospective purchaser of airspace rights is placed on notice that he will possibly confront statutes or regulations, or both, on the federal and state level impairing the traditional concepts of "fee simple" ownership.

The problem of valuation of airspace is also given extensive treatment, including the problems of appraisal, appraisal techniques, the determination of market value, and methodology. Efforts to show the reader the maze of problems that one may encounter in the appraisal of airspace value as well as the application of various formula thereto are well handled in a chapter treating that specific area. In concluding this topic, after reviewing various appraisal approaches, the author observes that the Kuehnule method of commercial airspace valuation, along with certain derivations, should prove to be of sufficient theoretical soundness to withstand

13. *Id.* at 259-260.
14. *Id.* at 211.

any judicial scrutiny which might ultimately be applied, as far as the legitimacy of the methodological framework is concerned.[15]

The final major chapter outlines the airspace transaction from its inception to completion. The various types of legal arrangements and the legal instruments used in transferring rights in airspace, and methods of description employed are clearly set forth for the reader.

Essential to a review of this sort is an estimate of worth of the subject book and the readership which will find it of primary value. By his own terms the author states that it is not his intention to provide the practicing attorney with a "form book," although many sample documents and/or instruments are included in an appendix. He views his book as a "compendium of law and practice" for lawyers, but hopefully, to some extent different, based upon the idea that the lawyer's function itself is somewhat different now than in other times—he must know a reasonable amount about a great many things. Accordingly the book goes beyond the usual legal treatise and becomes a more far-reaching social document with broader implications. Thus the volume, as well as being a worthy addition to the property section of the practitioner's library, is also of value to scholars, real estate brokers, public administrators and the lay public on the implications and applications of airspace in modern society.

Looking toward the future, the author sees the full utilization of airspace as another planning tool, a part of the total fabric to be woven by planners and civic leaders in shaping the environment of urban America of the 1970's and 1980's and beyond.[16] He considers airspace as another economic resource, like water, minerals and the soil, to be used wisely and in balance with other factors which rank high on our scale of values. Its utilization is a part of the total urban picture for which governments must plan. How wisely we use it, as in all things, is dependent upon how wisely we see the vision of the years to come.

CARL E. B. MCKENRY, JR.*

15. Kuehnle points out that the value of the airspace interest decreases as the construction costs, interference with reasonable use, and added costs of maintenance increase. The Kuehnle formula is as follows:

$V - (X + Y) - I = A$

$V - A = R$

V reresents the land value before removing the airspace interest.

X represents the economic value lost due to reduction of utility and income in the design of the building for airspace construction.

Y represents the additional cost of construction.

I represents the interest on the investment for the increased period of construction resulting from the divided space-surface interests.

A represents the value of the "air-rights" after severance of the airspace.

R represents the value of the remainder.

16. Wright, *supra* note 1, at 419.

* A.B., J.D., LL.M. University of Miami; LL.M., New York University; Associate Professor of Transportation Management and Law, University of Miami (joint appointment between the School of Law and the School of Business.)